IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 23723 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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POONAM ENGINEERING WORKS - Petitioner(s)
Versus
DELUX BEARINGS LTD - Respondent(s)

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Appearance :
MR RR SHAH for the Petitioner.
MR Mihir Joshi, Senior Advocate with Mr. YJ JASANI for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 05/10/2007

ORAL JUDGMENT

Rule. Learned advocate Mr. Y.J.Jasani waives service of notice of Rule on behalf of the respondent. The present petition has been preferred against the

order dated 10th September, 2007 below exh. 18 in Civil Suit no. 1832 of 2007 passed by the City Civil Court, Ahmedabad. The aforesaid application was preferred by the present petitioner (original defendant)under Order 7 Rule 11 of the Code of Civil Procedure Code read with section 151 of the Code of Civil Procedure mainly on the ground that the Court has no jurisdiction and therefore, the plaint ought to be rejected. There is no disclosure of the cause of action and therefore, the plaint ought to be rejected. This application has not been accepted by the trial court and the same has been dismissed. The petitioner (original defendant)has therefore, preferred the present Special Civil Application.

2. Having heard the learned counsel for both the sides and looking to the facts and circumstances of the case, I see no reason to entertain the present petition. The order passed by the trial court is true, correct, legal and in consonance with the facts of the case and judicial pronouncements, mainly for the following reasons:

(i) It appears from the facts of the case that the present respondent (original plaintiff) has instituted Civil suit no. 1832 of 2007 for infringement action and passing of breach of copy right. The present respondent (original plaintiff) has registered trade mark "Deluxe Bearing" and the petitioner (original defendant) is manufacturing same item and selling the same with the trade mark "Super Deluxe bearings". Looking to the allegations levelled in the plaint filed by the original plaintiff, there are unequivocal

and unambiguous statements of facts pertaining to their branch office at Ahmedabad as well as the fact of their carrying on business at Ahmedabad. There are also clear allegations against original defendant that they are manufacturing bearings and they are committing breach of copy right of the original plaintiff. There are also allegations as to passing off, looking to the averments made paragraphs 20, 24 and 25 specifically. The learned advocates for both the sides have taken this Court to several documents which were produce before the trial court. There are more than one dozen documents which are reflecting the fact that the original plaintiff is carrying on business at Ahmedabad. They have a branch office at Ahmedabad. The certificate of registration under section 22 of the Bombay Sales Tax Act, 1959 also reveals the fact that the original plaintiff has additional place of business at Ahmedabad. Number of other documents have been pointed out by the learned advocate for the original plaintiff which link the business of the original plaintiff at Ahmedabad, having office at Ahmedabad. Looking to the averments and allegations levelled in the plaint in the aforesaid paragraph, there are direct allegations against the defendant that there is an infringement of trade mark of copy right vested in the original plaintiff by the defendant. They are also selling their goods at Ahmedabad without issuing bills. Looking to the averments in the plaint as they are, the place of sale by defendant is also mentioned. Month and year are also mentioned. These material facts have been disclosed in the plaint by the

plaintiff, which constitute disclosure of cause of action. It is one thing not to disclose of cause of action at all and it is altogether another thing not to have cause of action at all. It is altogether another thing that the plaintiff does not have cause of action at all. It is one thing to disclose material facts by the plaintiff and it is altogether another thing if full particulars are not given by the original plaintiff. In the earlier case, that is, if there is no disclosure of cause of action or if the plaintiff has not disclosed material facts, then the case may fall under Order 7 Rule 11 of Civil Procedure Code. But looking to the facts of the present case, as stated hereinabove, there are enough averments in the plaint which disclose the cause of action and all material facts have been given by the original plaintiff. Therefore, the impugned order passed by the trial court rejecting the application preferred by the original defendant under Order 11, Rule 7 of Civil Procedure Code requires no interference by this Court.

(ii) It also prima facie appears from the facts of the case that the original defendant is in search of full particulars of the averments and allegations against them. It is vehemently submitted by the learned advocate for the petitioner (original defendant) that the plaintiff has no cause of action and the plaintiff has not disclosed full particulars of allegations and hence the application exh. 18 preferred by the petitioner (original defendant) under Order 7 Rule 11 of Civil Procedure Code ought to have been allowed by the trial court. This contention is

not accepted by this Court. It appears that the trial court has rightly appreciated the distinction between "non-disclosure of cause of action" and "the plaintiff does not have cause of action". If there is no disclosure of the cause of action by reading the plaint as it is, the application exh. 18 preferred by the original defendant can be allowed. But in the facts of the present case, as stated hereinabove, full particulars or meticulous details of sale transactions may be given at the time of evidence stage by the original plaintiff. In my opinion, therefore, looking to the plaint, as it is and the documents presented by the original plaintiff as they are, there is a disclosure of cause of action for infringement, passing of and breach of copy right. The defence raised by the original defendant and the evaluation of the evidence at the stage of application under Order VII,Rule 11 of Civil Procedure Code is not required at all.

(iii) The learned advocate for the petitioner (original defendant) has relied upon the following decisions:

(1996) 2 GLG 393, AIR 2006 SC 730, PTC (Suppl)(1) 134 (Delhi)

None of these judgments is helpful to the present petitioner (original defendant) mainly for the reason that looking to the averments made in the plaint as they are and looking to the documents which are presented before the trial court, in my opinion, there is a full disclosure of cause of action and material facts have also been disclosed and even particulars of allegations have also been disclosed.

(iv) The learned advocate for the respondent (original plaintiff) has relied upon the following decisions.

It has been held by the Hon'ble Supreme Court in the case of **D. Ramchandran vs. R.V.Janakiraman and others reported in (1999) 3 SCC, 267, especially in paragraphs 8,9,10 and 15** as under:

"8. We do not consider it necessary to refer in detail to any part of the reasoning in the judgment; instead, we proceed to consider the arguments advanced before us on the basis of the pleadings contained in the election petition. It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter.

9. Under Order 6 Rule 16, the court is enabled to strike out a pleading (a) which may be unnecessary scandalous, frivolous or vexatious; or (b) which may tend to prejudice, embarrass or delay the fair trial of the suit; or (c) which is otherwise an abuse of the

process of the court. We have already pointed out that it is not the case of the first respondent that the pleading in the election petition is vitiated by all or any one of the aforesaid defects mentioned in the Rule. Hence, striking out parts of the pleading in this case was not at all justified.

10. On the other hand, Rule 11 of Order 7 enjoins the court to reject the plaint where it does not disclose a cause of action. There is no question of striking out any portion of the pleading under this Rule. The application filed by the first respondent in OA No. 36 of 1997 is on the footing that the averments in the election petition did not contain the material facts giving rise to a triable issue or disclosing a cause of action. Laying stress upon the provisions of Order 7 Rule 11(a), learned Senior Counsel for the first respondent took us through the entire election petition and submitted that the averments therein do not disclose a cause of action. On a reading of the petition, we do not find it possible to agree with him. The election petition as such does disclose a cause of action which is unrebutted could void the election and the provisions of Order 7 Rule 11(a) CPC cannot therefore, be invoked in this case. There is no merit in the contention that some of the allegations are berest of material facts and as such do not disclose a cause of action. It is elementary that under Order 7 Rule 11(a) CPC, the court cannot dissect the pleading into several parts and consider whether each one of them discloses a cause of action. Under the Rule, there cannot be a partial rejection of the plaint or petition. See Roop Lal Sathi vs. Nachhattar

Singh Gill. We are satisfied that the election petition in this case could not have been rejected in limine without a trial.

15. As regards OA No. 186 of 1997, the approach of the learned Judge is totally erroneous as he has not kept in mind the distinction between "material fcts" and "full particulars". Nor has he correctly appreciated the decision of this Court referred to by him. We do not want to express any opinion at this stage on the additional documents produced by the appellant. The trial court may decide the application in the light of the relevant judgments of this Court, in particular, those laying down the difference between "material facts" and "full particulars". Hence the Order in OA No. 186 of 1997 is set aside and the application is remanded for fresh disposal in accordance with law."

Thus, what is required to be seen at the stage of deciding application under Order 7, Rule 11 of Civil Procedure Code is a disclosure of material facts which is sufficient for rejection of an application under Order VII, Rule 11(a) of Civil Procedure Code even if full particulars are not given in the plaint. In the facts of the present case, as stated hereinabove, there is a disclosure of material facts and even particulars have been disclosed.

In view of the aforesaid judgment, it is clear that if averments made in the plaint are taken as they are and if there is no rebuttal or if they are presumed to have been admitted by the original defendant, then, if

suit is to be allowed then in that circumstance, application under Order VII Rule 11(a) cannot be entertained.

(v) Paragraph-6 of the judgment in the case of **Shakti Pottery Works and others vs. Virjibhai Becharbhai reported in 20(2) GLR, 182** reads as under:

> "6. We must frankly state that so far as the first two contentions are concerned, there is no merit in them. In order to justify the first contention that the learned Judge ought to have rejected the plaint under Order 7 Rule 11(a) of the Civil Procedure Code inasmuch as it did not disclose any cause of action, we have to look to the averments made in the plaint on demurrer. To enable a Court to reject the plaint under Order 7 Rule 11(a) of the Civil Procedure Code on the ground of nondisclosure of cause of action, the Court has to look to the plaint and plaint alone. In Kanhayalal vs. National Bank of India Ltd. (1913) 40 ILR, (Calcutta) 598 the Judicial Committee of the Privy Council, while dealing with a similar contention of the defendant that a suit as framed would not lie, observed as under at page 609;
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> "..In asking the Court to decide an issue like the present (which is essentially a demurrer, by whatever name it may be called) the defendants must be taken to admit for the sake of argument that the allegations of the plaintiff in his plaint are true modo it forma. In so doing they reserve to themselves the right to show that these allegations are wholly or partially false in the further stage of the action, should the preliminary point be overruled, but so far as the decision on the preliminary point is concerned everything contained in the plaint must be taken to be true as stated."

We have therefore, to look to the averments in the plaint for purposes of finding out whether it discloses a cause of action or not, but in doing so, it can be only on the demurrer of the defendants who must be taken to admit for the sake of argument that the allegations of the plaint in his plaint are true in manner as well as in form. The plaintiff has in paragraph 4 of his plaint set out three agreements which were executed from time to time between the plaintiff and the defendants for purposes of appointing the plaintiff as sole selling agents of the products of the defendant NO. 1 firm. In paragraph 5 the averment regarding the agreed rate of commission of 4% on the price of the goods sold has been set out. In paragraph 6 the fact of the deposit of Rs. 50,000/- made by the plaintiff under the first agreement of 12.5.1967 and the continuance of the deposit under the last agreement of 30th December, 1972 has been averred. In paragraph 8 the plaintiff referred to two defaults being committed by the defendants in payment of the commission earned by him for sales effected in the month of November and December, 1972 of the products of the defendants. In paragraph 9 the plaintiff alleged three defaults having been committed by the defendants in the matter of payment of the commission earned by him on the sales effected in the months of January, February and March, 1973. He also referred to the fact of the defendants having drawn a cheque on 12th February, 1973 in favour of the plaintiff on the State Bank of Saurashtra, Thangadh towards his commission and the return thereof after being dishonoured. In paragraph 10, the plaintiff averred and stated that according to the agreement between the parties, the defendants were bound to pay the commission by 15th of the next month and the defendants were under obligation on strict compliance of this condition, and in no circumstances, the defendants had to commit any default in payment thereof. However, on account of any

unexpected circumstances if the defendants committed defaults in payment of interest for a period of three months, the plaintiff was entitled to terminate the contract after notice to the defendants and consequently to the refund of the deposit amount and the payment of the commission amount due at a time. In paragraph 11 he stated that on having learnt that the defendants were trying to transfer their factory so as to deprive the creditors of their dues since a public notice was inserted on 16.2.1973 in the local daily "Fulchhab" of Rajkot he, by his telegram of 2nd April 1973 terminated the contract and called upon the defendants to make a refund of the deposit amount of Rs. 50,000/- and to pay the arrears of commission. In paragraph 14, the plaintiff stated that the cause of action of the suit had arisen on 2nd April 1973 when the contract was terminated s a result of the failure on the part of the defendants to pay the commission for five months. This is the gist of the averments made in the plaint and if these allegations are to be accepted as true in the manner and in the form in which they have been made, the conclusion is inescapable that the plaint doe disclose the cause of action. It may be that on the trial of issues between the parties the claim of the plaintiff may not be sustained either on the interpretation of the terms and conditions of the agreements between the parties or for any other reason in which case, the suit may be liable to be dismissed. There is a clear distinction between the cases where a plaint does not disclose any cause of action and the cases where after the parties have adduced oral and documentary evidence, a Court comes to the conclusion on consideration thereof that there was no cause of action. It is only in the former case that a Court will be justified in rejecting the plaint under Order 7 Rule 11(a) of the Civil Procedure Code, whereas in the latter case where the Court finds no cause of action on consideration of the entire material placed

> before it, obviously it will not be case falling within the terms of the aforesaid rule. In this connection, we may refer to a decision of the Full Bench of Allahabad High Court in Jagannath Prasad and others vs. Smt. Chandravati and others, AIR 1970 All 309 where this distinction has been brought out. In the present case, in our opinion, it cannot be contended without violence to the language that on the averments made in the plaint, if accepted as true, there is a nondisclosure of cause of action which would attract the application of Order 7 Rule 11(a) of the Civil Procedure Code." (Emphasis supplied)

From the aforesaid judgment, it is clear that whenever an application under Order 7 Rule 11 of Civil Procedure Code is to be decided and when it is to be decided whether the plaintiff has disclosed cause of action or not, in that situation, the averments in the plaint are to be read as they are and if the defendants are admitting the facts as stated in the plaint, the plaint can be rejected or not, that test ought to be applied. For the sake of arguments, the allegations of the plaintiff in the plaint are true modo it forma then also whether the plaint can be rejected or not. If the aforesaid test is applied in the facts of the present case, in my opinion, the plaint of the plaintiff cannot be rejected under Order VII Rule 11 of Civil Procedure Code.

(Vi) It has been held by the Hon'ble Supreme Court in the case of **State of Orissa vs. Klockner and Company and others reported in (1996) 8 SCC, 377,** especially in para-25 as under:

"25. Now, coming to Special Leave Petition (C) No. 19846 of 1995, this petition is filed against the judgment and order of the High Court of Orissa at Cuttack in First Appeal No. 14 of 1995 dated 12.5.1995. By the order under appeal the High Court has reversed the order of the learned Subordinate Judge, Bhubneshwar dated 26.3.1994, by which the learned Subordinate Judge accepting an application filed under Order 7 Rule 11 Civil Procedure, rejected the plaint in Title Suit no.231 of 1992 filed by the first respondent in special leave petition. The learned Single Judge of the High Court while reversing the order of the learned Subordinate Judge observed s follows:

" In the present case on a fair reading of the petition filed by Defendant under Order 7 Rule 11 of CPC it is clear that the case of the applicant is that the plaintiff has no cause of action to file the suit. It is not specifically pleaded by the applicant that the plaint does not disclose any cause of action. The learned trial Judge has also not recorded any specific finding to this effect. From the discussions in the order it appears that the learned trial Judge has not maintained the distinction between the plea that there was no cause of action for the suit and the plea that the plaint does not disclose a cause of action. No specific reason or ground is stated in the order in support of the finding that the plaint is to be rejected under Order 7 Rule 11(a). From the averments in the plaint, it is clear that the plaintiff has pleaded a cause of action for filing the suit seeking the reliefs stated in it. That is not to say that the plaintiff has cause of action to file the suit for the reliefs sought that question is to be determined on the basis of materials (other than the plaint) which may be produced by the parties at appropriate stage in the suit. For the limited purpose of determining the question whether the suit is to be wiped out under Order 7 Rule 11(a) or not the averments in the plaint are only to

be looked into. The position noted above is also clear from the petition filed by Defendant no.1 under Order 7 Rule 11 in which the thrust of the case pleaded is that on the stipulation in the agreement of 20.4.1982, the plaintiff is not entitled to file a suit seeking any of the reliefs stated in the plaint.

10. Coming to the question whether the plaint is to be rejected under clause (d) of Rule 11 of Order 7, the Supreme Court in the case of Orient Transport Co. has clearly laid down that there is a distinction between a case in which the validity, effect and existence of the arbitration agreement is challenged and suit in which the validity of the contract which contains an arbitration clause is challenged. The bar to suit under Section 32 of the Arbitration Act extends to a case where the existence, effect or validity of an arbitration agreement is challenged and not to the latter type of the suit. On this question too the learned trial Judge has failed to maintain the distinction between the two types of cases. He has failed to notice that the case pleaded by the plaintiff is that the entire agreement including the arbitration clause is null and void and unenforceable and not that the arbitration agreement is null and void.

11. From the lower court record in the case and also the records in a similar suit filed by the State of Orissa, Title Suit no. 152 of 1993 in which OMC Ltd. is a defendant, it appears that in both the cases Defendant 1 Klockner and Company filed applications under Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961. Such application presupposes that the applicant accepts the position that the said Act applies to the case and the Arbitration Act, 1940 has no application to the case. Under the Foreign Awards Act, there is no specific provision for bar of suit. Further, from the averments in the application filed under Order 7 Rule 11 of CPC, it is clear that the main case pleaded by the applicant was that the parties

had agreed that the Swiss law will be applicable to the contract as well as the Arbitration Agreement and the venue of arbitration will be at London and, therefore, the Indian law in general and the Arbitration Act in particular, have no application to the case. Alternatively the applicant has pleaded that even assuming that the Indian law of Arbitration applies to the case the the suit is barred under Section 32 of the Act. The learned trial Judge does not appear to have considered the main case pleaded by the applicant but disposed of the petition on consideration of the alternative case pleaded by it. Therefore, this finding against bar of the suit under Order 7 Rule 11(d) is also vitiated.

12. On the analysis and discussions in the foregoing paragraphs, it is my considered view that the order passed by the order passed by the learned trial Judge rejecting the plaint under Order 7 Rule 11(a) of CPC is unsustainable and has to be set aside. Accordingly the appeal is allowed and the order dated 26.3.1994 of the Civil Judge (Senior Division) Bhubaneswar in Miscellaneous Case no. 75 of 1993 is set aside. There will be no order for costs of this Court."

Thus, from the aforesaid judgment also, there is a remarkable difference between "non-disclosure of cause of action" and "not having cause of action". The trial court has rightly appreciated the ratio laid down in the aforesaid judgments and the facts of the case and the averments made in the plaint and therefore, has rightly rejected the application preferred by the original defendant under Order 7 Rule 11 of Civil Procedure Code.

(vii) The aforesaid view has also been reiterated by the Hon'ble Supreme Court in the case of **Liverpool and London S.P. and I Association Ltd. vs. M.V.Sea Success I and another reported in (2004) 9 SCC, 512.**

3. In view of the aforesaid decisions and looking to the plaint filed by the original plaintiff, especially paragraphs 20, 24 and 25 thereof, there is a disclosure of cause of action. The court is not in search of proof of those allegations at this stage. Hence, the impugned order passed by the trial court is true, correct and in consonance with facts and law. No error has been committed by the trial court in rejecting the application exh. 18 filed by the present petitioner (original defendant). There is no substance in this petition. Hence, the same is dismissed. Rule is discharged with no order as to costs.

(D.N.Patel,J)

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